85-594

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

DEAN A. and BARBARA J. ROSTAD,
Respondents,

vs.

ON-DECK, INC., a New Jersey corporation,
Petitioner,

and

GARY GUY WILLEY, and GENERAL SPORTCRAFT CO. LTD., a New Jersey corporation,
Defendants.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

RESPONDENTS' BRIEF IN OPPOSITION

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I.

QUESTION PRESENTED FOR REVIEW

Whether the exercise of personal jurisdiction by a Minnesota court over an out-of-state manufacturer of a nationally and internationally marketed consumer product, in connection with an action brought by a Minnesota resident severely injured in Minnesota by that product, complies with the Due Process Clause of the Fourteenth Amendment, where the manufacturer purposefully utilized large national distributors to achieve maximum nationwide marketing of that product, realized substantial profits from the bulk sale of that product in Minnesota each year and could thereby reasonably anticipate being haled into court in Minnesota.

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II.

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ON WRIT OF CERTIORARI TO THE
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RESPONDENTS' BRIEF IN OPPOSITION

III.

STATEMENT OF THE CASE

A. The Injury.

Petitioner On-Deck, Inc., a New Jersey corporation, manufactures a vinyl-covered, solid metal bat-weight, ring shaped and molded similar to a donut. Designed to add weight to ordinary bats for use by ballplayers when "on-deck" during warm-up exercises or during practice swings, the bat-weight slips onto the handle end of the bat and is

supposed to be secured by the thick end of the bat. The velocity attained by the bat-weight during a practice swing is considerable, transforming the weight into an extremely hazardous missile if the weight should separate from the bat.

Respondent Dean Rostad suffers severe and permanent brain damage as a result of such an accident. While umpiring an official softball game of the Parks and Recreation League of the City of Minneapolis on August 6, 1978, Dean Rostad was suddenly and unexpectedly struck in the skull by a 1-1/4 pound bat-weight manufactured by On-Deck. Mr. Rostad's head injury resulted in extensive hospitalization and severe residual mental, motor and verbal impairment. Similar accidents involving On-Deck's bat-weights have occurred in other states.

B. On-Deck's National and International Marketing Scheme.

On-Deck has manufactured a variety of bat-weights continuously since 1968. Throughout this 16-year period, On-Deck has engaged in a carefully and selectively chosen marketing scheme calculated to maximize the sales of its products throughout the United States, Canada and Mexico. To achieve its international marketing goals, On-Deck initially developed a highly profitable relationship with Elston Howard, a well-known baseball personality. Howard was made president of On-Deck and, as its agent, traveled throughout the United States making personal appearances at sporting goods shows and retail stores to promote the bat-weight and to give it a national identity. These highly advantageous promotional appearances were scheduled and arranged entirely by On-Deck. In addition, Frank Hamilton, then executive vice-president of On-Deck,

made promotional appearances at spring training camps throughout the United States and promotional trips with Elston Howard.

Recognizing the need for a nationally-based distributor of sporting goods to achieve its marketing goals, On-Deck negotiated an exclusive distributorship contract with General Sportcraft Co., Ltd., in 1968 (Appendix at A-6). General Sportcraft Co., Ltd., is a nationwide distributor of sporting goods and equipment with sales representatives serving all 50 states and several sales representatives physically located in the State of Minnesota.

The exclusive distributorship agreement between On-Deck and General Sportcraft is worthy of close scrutiny (Appendix at A-6). Pursuant to that contract, On-Deck agreed to sell its bat-weights in bulk to General Sportcraft for resale and distribution throughout "North America, [the] State of Hawaii, and all of the islands in the Caribbean Sea and the Gulf of Mexico." As with its relationship with Howard, On-Deck retained significant control and decision-making powers in this contract. The contract expressly retained control and power in On-Deck over the sale, promotion and marketing of the bat-weights nationwide. The contract notably provided, *inter alia*, that:

> —The On-Deck trademark was to be prominently displayed upon all packaging in which the product was to be sold to give On-Deck a national identity;
>
> —On-Deck retained the right to sell the bat-weight to the organized professional major league baseball teams and to individual members of organized professional major league baseball teams;
>
> —On-Deck retained the right to promote its product to the professional baseball teams in the United States, Canada and Mexico; and

—On-Deck retained the right to approve or disapprove of any design change in the individual packages for the bat-weight.

Notably, the contract describes the distributor's territory as its "franchised" area. This designation is entirely consistent with the fact that On-Deck was in fact directing the promotion, sales and marketing of its bat-weights nationwide, including within the State of Minnesota.

The deposition statements of Frank Hamilton reflect that, during his promotional trips, Mr. Hamilton took actual orders for the purchase of On-Deck bat-weights and then directed the orders to General Sportcraft for packaging and delivery. At a sporting goods show in New York in 1968, Hamilton testified that he directly sold 10,000 bat-weights and that General Sportcraft merely delivered the weights to his customers. On-Deck directed the sales, marketing, packaging and promotion of its bat-weights nationwide, and General Sportcraft provided the avenues for assembly and delivery to retailers and consumers on a mass scale.

Marketing and distribution of On-Deck's bat-weights continued pursuant to the terms of the General Sportcraft contract until approximately 1973 on an exclusive basis. Sometime after 1973, On-Deck began bulk sales of its bat-weights to a number of other nationwide distributors including Sears, K-Mart, and Hillerich & Bradsby Company.

Exhibit K to Plaintiffs' Memorandum in Opposition to defendant's Motion for Dismissal in the trial court (Appendix at A-1) demonstrates that plaintiffs, on their own, verified the sale of On-Deck's bat-weights throughout the State of Minnesota. Exhibit K consists of the following:

1. Receipts from various retail outlets including Sears Roebuck & Co., in the Twin Cities for the sale of On-Deck bat-weights;

2. Affidavit of J. W. Gallop, corporate sporting goods buyer for K-Mart, that until 1981, K-Mart carried On-Deck bat-weights in *all* of its Minnesota stores;

3. Affidavit from Gene Ronning, former Minnesota sales representative for General Sportcraft, stating that from 1969 through 1980, he sold On-Deck bat-weights to *virtually every sporting goods store in the State of Minnesota;*

4. Affidavit of Chris Olson, a Robins, Zelle, Larson & Kaplan legal assistant, of a conversation with Ray Krump, equipment manager for the Minnesota Twins, that he has been buying On-Deck bat-weights for *at least 10 years;* and

5. Affidavit of Neson Berman, owner of A & B Sporting Goods Company, that throughout the 1970s he marketed *thousands* of On-Deck bat-weights in Minnesota.

Petitioner clearly knew that its bat-weights were sold in Minnesota through its distributor, General Sportcraft. Defendant's answer to plaintiffs' Supplemental Interrogatory No. 6(b) unequivocally states in relevant part:

> General Sportcraft which for the past 13 years has packaged the bat-weights *and sold them to retail stores throughout Minnesota.*

In fact, in his deposition, Frank Hamilton testified that the bat-weight was sold in all 50 states.

For 16 years, On-Deck has purposefully injected its product into the stream of commerce pursuant to a care-

fully structured marketing scheme, calculated to maximize the commercial marketing of this product throughout the United States, Canada and Mexico. To achieve this end, On-Deck utilized large nationally-based distributors, physically located in the State of Minnesota. To ensure a nationwide identity with its product, On-Deck retained significant control over the marketing of its product, including the packaging of the product. On-Deck knew its product was sold throughout the State of Minnesota and realized a substantial profit from the bulk sale of its product in Minnesota each year. As a result of injuries caused by its product, to date, On-Deck has been successfully sued in Delaware, Tennessee and New Jersey.

IV.

ARGUMENT FOR DENYING WRIT OF CERTIORARI

A. The Decision of the Supreme Court of Minnesota is Consistent With Decisions of the Supreme Court of the United States.

There is no dispute that the Minnesota long-arm statute, Minn. Stat. § 543.19, confers personal jurisdiction over non-resident defendants to the fullest extent allowed by constitutional due process. *Land-O-Nod Co. v. Bassett Furniture Industries, Inc.*, 708 F.2d 1338 (8th Cir. 1983); *Vikse v. Flaby*, 316 N.W.2d 276 (Minn. 1982). Constitutional due process is satisfied and jurisdiction sustainable where sufficient "minimum contacts" exist between the defendant and the forum such that the maintenance of the suit does not "offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Whether the exercise of juris-

diction is fair and reasonable depends upon "the relationship among the defendant, the forum and the litigation." *Rush v. Savchuk,* 444 U.S. 320 (1980). "Minimum contacts" exist if there is some act "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U.S. 235, 253 (1958).

The United States Supreme Court in *Shaffer v. Heitner,* 433 U.S. 186 (1977), noted that the inquiry into a state court's jurisdiction over a foreign corporation appropriately focuses not on whether the corporation was "present" in that state but on whether there have been

> such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.

433 U.S. at 203. The Court further noted that mechanical or quantitative evaluations of the defendant's activities in the forum could not resolve the question of reasonableness:

> Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties or relations. . . . Thus the relationship among the defendant, the forum and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction.

433 U.S. at 203-204 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

The quantity, nature and quality of contacts necessary to satisfy the due process concerns of *International Shoe* in a products liability action involving non-resident defendant corporations has received considerable attention since the now famous *dicta* of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) [1]

World-Wide Volkswagen concerned the amenability to suit in an Oklahoma state court of a small New York car dealer and an out-of-state regional distributor of automobiles. The car dealer sold vehicles at retail *only in New York*, and the distributor sold vehicles, parts and accessories *only to dealers in the states of New York, New Jersey and Connecticut*. There were no facts demonstrating any direct or indirect connection with the State of Oklahoma by these two defendants. The Court found that the distributor and retailer solicited no business in Oklahoma, availed themselves of none of the privileges and benefits of Oklahoma law, and did not "indirectly, through others, serve or seek to serve the Oklahoma market." 444 U.S. at 295. With respect to these findings, the Court held that the

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[1] *See, e.g., Bean Dredging Corp. v. Dredge Technology Corp., et al.*, 744 F.2d 1081 (5th Cir. 1984); *Nelson v. Park Indus., Inc.*, 717 F.2d 1120 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1278 (1984); *Hedrick v. Daiko Shoji Co., Ltd., et al*, 715 F.2d 1355 (9th Cir. 1983); *Noel v. S.S. Kresge Co.*, 669 F.2d 1150 (6th Cir. 1982); *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty Ltd.*, 647 F.2d 200 (D. C. Cir. 1981); *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir. 1981); *cert. denied*, 454 U.S. 1085 (1982); *Oswalt v. Scripto, Inc.*, 616 F.2d 191 (5th Cir. 1980); *Copie. : Typewriters Calculators, Inc. v. Toshiba Corp.*, 576 F.Supp. 312 (D. Md. 1983); *Wass v. American Safety Equip. Corp.*, 573 F.Supp. 39 (D. Me. 1983); *Papafagos v. Fiat Auto*, 568 F.Supp. 692 (D.N.H. 1983); *Lasky v. Continental Products Corp.*, 569 F.Supp. 1225 (E.D. Pa. 1983); *Rockwell Int'l Corp. v. Costruzioni Aeronatuche Giovanni Augusta*, 553 F.Supp. 328 (E.D. Pa. 1982); *Santiago v. BRS, Inc.*, 528 F.Supp. 755 (D.P.R. 1981).

mere fortuitous occurrence of an accident involving one of the defendant's vehicles in Oklahoma did not give rise to jurisdiction over the distributor and retailer in an Oklahoma state court. Because the accident fortuitously occurred in Oklahoma, the Supreme Court was obviously unable to focus on any conduct by which the two defendants availed themselves of the privilege of conducting business in Oklahoma.

The Court, however, discussed at some length those circumstances under which a non-resident manufacturer or distributor *would* be subject to personal jurisdiction by virtue of its indirect contacts with the forum:

> . . . The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, *it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there* (citations omitted). The Due Process Clause, by ensuring the "orderly administration of the laws," [citation omitted] gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.
>
> * * *
>
> When a corporation "purposefully avails itself of the privilege of conducting activities with the forum state" [citation omitted], it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or, if the risks are too great, severing its connection with the State. Hence, if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen *is not*

> *simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly a market for its product in other states, it is not unreasonable to subject it to suit in one of those states* if its allegedly defective merchandise has there been a source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over *a corporation that delivers its product into the stream of commerce with the expectation that they will be purchased by consumers in the forum state.* (Emphasis added)

Id. at 297-298 (citing *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961)).[3]

The decision of the Minnesota Supreme Court in this action is entirely consistent with the mandates of constitutional due process set forth by this Court in *World-Wide Volkswagen* and its progeny. As the Minnesota Supreme Court concluded:

> In short, On-Deck sold thousands of its bat-weights in Minnesota. The reason the weights were sold here is that On-Deck contracted with General Sports and other national retailers to serve the national market and, specifically, the Minnesota market. It profited thereby. This is purposeful availment by On-Deck of

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[3] Importantly, the Illinois Supreme Court in *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961) (cited favorably above by the Supreme Court in *World-Wide Volkswagen)* stated:

> Where the alleged liability arises, as in this case, from the manufacture of products presumably sold in contemplation of use here, *it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into this state.*

176 N.E.2d at 766. (Emphasis added)

> the benefits and corresponding responsibilities of doing business in Minnesota. Traditional notions of fair play and substantial justice dictate that On-Deck should defend this lawsuit in Minnesota; they would be offended if these plaintiffs were limited to suit in New Jersey.

Petitioner's Appendix at A-11.

B. The Decision of the Supreme Court of Minnesota is Consistent With Decisions of the Federal Court of Appeals.

Petitioner cites three opinions of the United States Federal Court of Appeals which it states conflicts with the decision of the Supreme Court of Minnesota in this action. Each of those Federal Court of Appeals decisions is entirely distinguishable from the decision of the Supreme Court of Minnesota in this action and does not provide a basis whatsoever for the granting of certiorari in this action.

1. *Humble v. Toyota Motor Co., Ltd.*, 727 F.2d 709 (8th Cir. 1984).

Humble is one of a line of decisions in which the court addresses the question of whether personal jurisdiction can be fairly and reasonably exercised over a *component parts manufacturer* who sells its parts *solely* to the manufacturer of the subject product prior to that product's entrance into the stream of commerce. In *Humble*, the Arakawa Corporation, a Japanese corporation, manufactured front and back seats for automobiles which were sold solely to the Toyota Corporation in Japan. Toyota, Japan, then sold

the finished product, its automobiles, to Toyota subsidiaries throughout the world. Toyota, USA, one of those subsidiaries, then distributed its automobiles to dealers throughout this country. The plaintiff in *Humble,* injured in a Toyota automobile, attempted to obtain personal jurisdiction over Arakawa, the Japanese component parts manufacturer, in Iowa.

The Eighth Circuit Court of Appeals, applying the very same due process standards applied by the Supreme Court of Minnesota in this action, held that the relationship between the plaintiff, the forum and the Japanese component parts manufacturer was too attenuated to fairly and reasonably exercise jurisdiction over that corporation in Iowa. It is important to note first that the *very same* legal standard was applied to the facts of *Humble.* Second, the manufacturer of the subject defective automobile, Toyota, Japan, had no direct contacts with the State of Iowa. Yet the plaintiff in *Humble* successfully exercised jurisdiction over that corporation. The due process analysis in *Humble* precisely tracks the analysis engaged in by the Minnesota Supreme Court in this action.

2. *Glater v. Eli Lilly & Co.,* 744 F.2d 213 (1st Cir. 1984).

The "stream of commerce theory" first introduced in *World-Wide Volkswagen* was not considered by the First Circuit Court of Appeals in *Glater.* The issue in *Glater* concerned the suffficiency of the *plaintiff's* contacts with the subject forum. The plaintiff in *Glater* was injured as a result of a drug ingested by her mother *in utero;* a drug which she purchased and consumed in Massachusetts. Yet, the *Glater* plaintiff sought to exercise jurisdiction over the

defendant drug manufacturer in New Hampshire. The court held that specific jurisdiction could not be exercised over the defendant because the plaintiff's injury was not caused by defendant's activities in New Hampshire but rather by defendant's activities in Massachusetts. The court refused to exercise general jurisdiction over the defendant on the grounds that the defendant did not engage in the continuous and systematic pursuit of business in New Hampshire.

Unlike in *Glater,* respondents, Minnesota residents, were injured by defendant's product in Minnesota—a product mass-marketed throughout Minnesota. The sufficiency of respondents' contacts with Minnesota is not now and never has been at issue in this matter.

3. *Hutson v. Fehr Bros., Inc.*, 584 F.2d 833 (8th Cir. 1978), *cert. denied*, 439 U.S. 983 (1978).

The plaintiff in *Hutson* was injured by a 3/8ths inch chain. The chain was manufactured by a corporation in Yugoslavia. The Yugoslavian corporation sold the chain to a corporation entitled Weissenfels who repackaged the chain and sold it to a British corporation. The British corporation sold the chain to a wholly-owned subsidiary in the United States. That subsidiary repackaged the chain and sold it to a retailer who sold it to the plaintiff's employer. The question in the case was whether the plaintiff could fairly and reasonably exercise *in personam* jurisdiction over Weissenfels, a distributor in the stream of commerce who merely repackaged the product and sold it solely to a British corporation.

Again, applying the very same legal analysis engaged in by the Minnesota Supreme Court in this action, the

Eighth Circuit Court of Appeals ruled that the connection between Weissenfels and the plaintiff was too attenuated to fairly support the exercise of jurisdiction over it in Arkansas. That defendant had neither manufactured the chain nor sold it to anyone in the United States. Further, that defendant had no control over the selection of customers or over other marketing decisions concerning the chain. The British corporation, defendant Fehr Bros., over which the plaintiff *did* successfully exercise jurisdiction, like On-Deck in this action, injected its product into the stream of commerce with the intent of mass-marketing it throughout the country, retained control over marketing decisions and could reasonably anticipate that its product would be sold in Arkansas.

Citing the United States Supreme Court decision in *Hanson v. Denckla, supra,* the *Hutson* court noted,

> Like any standard that requires a determination of "reasonableness," the "minimum contacts" test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present. (Cites omitted)

584 F.2d 833, 837 (citing 357 U.S. 235, 246).

Weighing the facts in *Hutson,* the Eighth Circuit Court of Appeals concluded that the requisite "affiliating circumstances" were not present. Just as in *Hutson,* the Supreme Court of Minnesota weighed the unique facts in this case to determine whether the requisite "affiliating circumstances" were present. Clearly, the due process standard is consistently applied throughout these cases; each case differs not on the law but solely on its facts.

C. The Decision of the Supreme Court of Minnesota Is Consistent With the Decision of the Arizona Court of Appeals in *Rowell Laboratories, Inc. v. Superior Court*, 117 Ariz. 400, 573 P.2d 91 (1977).

Petitioner states on page 13 of its *Petition For Writ of Certiorari* that the Opinion of the Supreme Court of Minnesota is in conflict with the "Supreme Court of Arizona's decision in *Rowell Industries (sic), Inc. v. Superior Court*, 117 Ariz. 400, 573 P.2d 91 (1977)." First, it is important to note that the decision in *Rowell*, which is found on page 91 of the 573rd volume of the *Pacific Second Reporter*, is a decision of the *Court of Appeals of Arizona, Division 2*, and *not* a decision of the Supreme Court of Arizona. This Court should take judicial notice of the fact that the Court of Appeals of Arizona in 1977 was and remains an intermediate appellate court and not a state court of last resort.

In any event, the decision in *Rowell* is essentially similar to the decision in *Glater, supra*. The plaintiff in *Rowell* was injured as a result of a drug ingested by her mother in Ohio. Similarly, the *Rowell* court was concerned with the sufficiency of the *plaintiff's* contacts with the Arizona forum to justify the exercise of specific jurisdiction over the defendant in that forum. Once again, there is no dispute in this action that the tort occurred in Minnesota, the subject forum.

V.

CONCLUSION

Nationwide marketing of consumer products through national independent distributors has prompted this Court and other courts to formulate a standard to dictate when and whether a court can fairly and reasonably exercise jurisdiction over an out-of-state manufacturer of such products. As this Court noted in *World-Wide Volkswagen*, due process mandates that this standard lend a degree of predictability to the legal system that allows such manufacturers to structure their conduct with some minimum assurance as to where that conduct will and will not render them liable to suit. Although this standard will protect such a manufacturer whose product reaches a forum fortuitously, courts have uniformly held that the fairness requirements of due process do not extend so far as to permit a manufacturer to insulate itself from the reach of a forum's long-arm statute by using an intermediary or independent distributor. If the manufacturer intends to maximize the nationwide marketing of a consumer product, fairness and reasonableness mandate that the manufacturer be amenable to suit in a forum in which its product is mass-marketed and in a forum where that product has injured a user or consumer.

This standard, first discussed in *World-Wide Volkswagen* and later developed in case law cited above, has been uniformly applied in this action and in every case cited in petitioner's Petition for Writ of Certiorari. The due process standard is uniform, consistent and fairly applied. Whether or not jurisdiction is exercised over a subject corporation is entirely dependent upon the unique facts of each case, not upon the due process standard employed.

Accordingly, none of the grounds set forth in Rule 17.1 (b) and (c) of the Supreme Court Rules provide any basis for granting petitioner's Petition For Writ of Certiorari. Respondents Dean and Barbara Rostad respectfully pray that petitioner's Petition For Writ of Certiorari be denied.

Dated this 1st day of November, 1985.

Respectfully submitted,

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APPENDIX

EXHIBIT K

STATE OF MINNESOTA
County of Hennepin

DISTRICT COURT
Fourth Judicial District

Dean A. and Barbara J. Rostad,

Plaintiffs,

vs.

On-Deck, Incorporated, a New Jersey corporation, and Gary Guy Willey,

Defendants.

AFFIDAVIT OF CHRIS L. OLSON

Court File No. 766532

STATE OF MINNESOTA

SS.

COUNTY OF RAMSEY

CHRIS L. OLSON, being first duly sworn on oath, deposes and says as follows:

1. That he is a Legal Assistant at Robins, Zelle, Larson & Kaplan, 1210 Minnesota Building, St. Paul, Minnesota 55101.

2. That since 1978, your Affiant has purchased On-Deck bat weights at the following retail outlets:

a. Kokesh Athletic & Golf Supply, 1001 Excelsior Avenue West, Hopkins, Minnesota.

b. Kokesh Athletic & Golf Supply, 3000 White Bear Avenue, St. Paul, Minnesota.

c. Kokesh Athletic & Golf Supply, 1917 South Robert, West St. Paul, Minnesota.

d. Steichen's Sporting Goods, 2425 Rice Street, St. Paul, Minnesota. *See attached Affidavit.

e. Sears Roebuck and Co., 425 Rice Street, St. Paul, Minnesota.

f. Sears Roebuck and Co., 8301 Flying Cloud Drive, Eden Prairie, Minnesota.

g. Sears Roebuck and Co., 12431 Wayzata Boulevard, Minnetonka, Minnesota.

h. C. R. Sports Center, 2107 Ford Parkway, Highland Park, Minnesota.

i. A & B Sporting Goods Co., 10 South Ninth Street, Minneapolis, Minnesota.

That these purchases by your Affiant are documented by the attached receipts.

3. On December 8, 1983, your Affiant was informed by Mr. J. W. Gallop, corporate sporting goods buyer for K-Mart, that until two years ago K-Mart carried On-Deck bat weights as a retail sporting goods product in all of its Minnesota stores.

4. On December 7, 1983, Mr. Gene Ronning, former distributor for General Sportcraft, informed your Affiant that he sold On-Deck batting weights between 1969 and 1980 to virtually all of the sporting good stores in the state of Minnesota. *See attached affidavit.

5. On December 8, 1983, your Affiant was informed by Mr. Ray Krump, equipment manager for the Minne-

sota Twins, that he has been buying On-Deck bat weights for use by the Minnesota Twins for at least ten years.

6. On December 7, 1983, your Affiant was informed by Mr. Neson Berman, owner and buyer of A & B Sporting Goods Co., that throughout the 1970s he had marketed thousands of On-Deck batting weights to retail customers. *See attached Affidavit.

7. That on December 8, 1983, your Affiant was informed by Mr. Robert Berens, sporting goods manager of the Ridgedale Sears Store that Sears has carried On-Deck bat weights for many years and currently carries On-Deck bat weights as a retail sporting goods item .

FURTHER YOUR AFFIANT SAITH NOT.

/s/ Chris L. Olson

Subscribed and sworn before me this 8th day of December, 1983.

/s/ Annette M. Berglund
Notary Public

AFFIDAVIT OF TED STEICHEN, JR.

Steichen's Sporting Goods, 2425 Rice Street, St. Paul, Minnesota

1. I am the proprietor of Steichen's Sporting Goods located at 2425 Rice Street, St. Paul, Minnesota.

2. That for a period of about five to ten years, comprising most of the 1970s, Elston Howard On-Deck bat weights were available for sale at Steichen's Sporting Goods.

3. That during the period Elston Howard On-Deck bat weights were available for sale at Steichen's Sporting Goods, approximately 75 percent of our sales of this product were to baseball teams and approximately 25 percent of our sales of this product were to softball teams.

4. That the sales by Steichen's Sporting Goods of the Elston Howard On-Deck bat weights were primarily made to highschools.

/s/ Ted Steichen, Jr.

Subscribed and sworn before me this 7th day of December, 1983.

/s/ Annette M. Berglund
Notary Public

AFFIDAVIT OF EUGENE RONNING

1. I live at 4615 Folwell Drive South, Minneapolis, Minnesota.

2. Between the mid 1950s and 1980, I was a field representative for General Sportcraft, a distributor of sporting goods.

3. Beginning with the 1969 edition of the General Sportcraft catalog, On Deck bat weights were available to all of my Minnesota customers.

4. Between the years 1969 and 1980, I sold On Deck bat weights throughout the state of Minnesota to sporting goods retail stores.

5. Between the years 1969 and 1980, I sold several thousands of these On Deck bat weights to retail sporting goods stores in the state of Minnesota.

6. My sales area was Minnesota, N and S. Dakota, parts of Wisconsin and Iowa.

/s/ Eugene Ronning

Subscribed and sworn to before me this 7th day of December, 1983.

/s/ Annette M. Berglund
Notary Public

AFFIDAVIT OF NESON BERMAN

A & B Sporting Goods, 10 South Ninth Street, Minneapolis, MN

1. I have been employed at A & B Sporting Goods since 1967.

2. My position is that of buyer.

3. Throughout the 1970s A & B bought On Deck bat weights from General Sportcraft.

4. The On Deck bat weights were always packaged in a box designated "Elston Howard's On-Deck Bat-Weight, distributed by General Sportcraft Co., Ltd., Bergenfield, N.J.", the same as that attached as Exhibit A.

5. All On Deck bat weights we obtained for sale to the public were purchased from General Sportcraft.

6. During the 1970s we sold thousands of these bat weights.

7. We ceased to carry the item in or around 1980 due to the fact that the bat weight was outlawed by Minnesota Little League organizations and softball leagues.

/s/ Neson Berman

Subscribed and sworn to before me this 7th day of December, 1983.

/s/ Annette M. Berglund
Notary Public

EXHIBIT L

THIS AGREEMENT, made the 10th day of September, 1968 by and between ON-DECK, INC., a New Jersey corporation having a place of business in the Borough of Englewood Cliffs, Bergen County, New Jersey, hereinafter called "SELLER", and GENERAL SPORTCRAFT CO., LTD., a New York corporation authorized to do business in the State of New Jersey having a place of business in the Borough of Bergenfield, Bergen County, New Jersey, hereinafter called the "PURCHASER", and ELSTON G. HOWARD, residing in the Township of Teaneck, Bergen County, New Jersey.

WITNESSETH:

WHEREAS, the SELLER is the exclusive licensee for the territory of North America, State of Hawaii and all of the Islands in the Caribbean Sea and the Gulf of Mexico, of an article of manufacture, hereinafter called a "Bat-Weight", which article of manufacture is the subject of a United States patent application filed by Frank G. Hamilton as inventor and entitled "Weight for a Baseball Bat", and

WHEREAS, the PURCHASER is desirous of purchasing said Bat-Weights from the SELLER and reselling and distributing said product throughout the continent of

North America, the state of Hawaii, and all islands in the Caribbean Sea and the Gulf of Mexico, and

WHEREAS, ELSTON G. HOWARD is a well-known baseball "personality" who is also the president of the SELLER.

NOW THEREFORE, in consideration of the mutual covenants and agreements and representations of the parties herein contained it is agreed by and among them as follows:

1. The SELLER represents that it has been granted by the owner of the aforesaid patent application filed by Frank G. Hamilton as inventor and entitled "Weight for a Baseball Bat", the right to manufacture, sell and distribute the article of manufacture described in the aforesaid United States patent application, and the SELLER furthermore represents that it has the right under the aforesaid grant to grant to the PURCHASER and provided the PURCHASER substantially abides by the provisions of this Agreement, does hereby grant to the PURCHASER the exclusive right to sell and distribute said Bat-Weights throughout the continent of North America, the state of Hawaii, and the islands located in the Caribbean Sea and the Gulf of Mexico, and to any agency of the United States Government including military exchanges notwithstanding that the product shall actually be used outside of the exclusive sales area of the PURCHASER. The PURCHASER agrees that notwithstanding the foregoing, the SELLER shall have the right to sell said Bat-Weights to the organized major league baseball teams, commonly known as the National and American Leagues, and to the individual members thereof and to individual players on said baseball teams solely for use by said leagues, teams or

players and not for the purpose of resale. The PURCHASER shall not have the right to sell said Bat-Weight in any geographic area in which it does not have the exclusive right to sell same.

2. Beginning January 1, 1969 the SELLER agrees to sell and the PURCHASER agrees to purchase a minimum of 5,000 Bat-Weights per month for delivery to the PURCHASER to and inclusive of October 31, 1969. The SELLER agrees to sell to the PURCHASER such additional Bat-Weights as it may require in excess of said minimum purchases. It is understood that it is the intention of the parties that the PURCHASER shall purchase Bat-Weights to be delivered in monthly installments in the year 1969 up to and including October 31st thereof.

The SELLER shall manufacture Bat-Weights of three sizes:

(a) Small Bat-Weights weighing approximately one pound and having a blue coating:

(b) Medium Bat-Weights weighing approximately 1 1/2 pounds and having an orange coating; and

(c) Large Bat-Weights weighing approximately 1 3/4 pounds and having a red coating.

The PURCHASER shall designate the proportion of small, medium and large Bat-Weights to be supplied to it by the SELLER. [contract not legible] . . .
weights for medium Bat-Weights; $1.48 per weight for large Bat-Weights, $1.89 per weight. The above prices shall be FOB, point of warehousing or packaging to be selected by PURCHASER within 25 miles of Bergenfield, New Jersey. The PURCHASER shall be responsible

for excess freight only in the event it selects a point of warehousing or packaging further from Bergenfield, New Jersey than 25 miles. The above price shall remain in effect for all orders for delivery prior to December 31, 1969. In addition to the above price, the PURCHASER shall be entitled to a 1% cash discount for payment within 30 days after deliverf, net 60 days. [contract not legible] . . . packaged in individual packages or in bulk. All individual packages shall have the following legend prominently displayed: "Elston Howard's On-Deck Bat-Weight".

5. The SELLER agrees to ship to the PURCHASER the Bat-Weights ordered by the PURCHASER 90 days after the date of the receipt [of] an order or within a reasonable time thereafter using due diligence unless said order permits later delivery. The PURCHASER shall pay for said [contract not legible . . .]
The SELLER agrees to supply such additional Bat-Weights in excess of the minimum number to be purchased by the PURCHASER pursuant to this agreement, as may be required by the PURCHASER in accordance with the terms of this agreement.

6. The SELLER shall be responsible for the promotion of said Bat-Weights among the professional baseball teams in the United States, Canada and Mexico. HOWARD agrees to make personal appearances at sporting shows, retail stores, and other promotionally advantageous appearances at the written request of the PURCHASER in order to promote the sale of said Bat-Weights, provided that said appearances do not interfere with HOWARD'S occupation as a baseball player or otherwise interfere with prior commitments made by him, and further

provided that the reasonable travel and living expenses of ELSTON HOWARD are provided by the PURCHASER or other sponsor of the appearance. Where the travel and living expenses are provided to HOWARD by his baseball employer or otherwise, additional payments on account thereof shall not be required by the PURCHASER.

The PURCHASER agrees to use all reasonable diligence in the promotion and sale and distribution of said Bat-Weights to retailers or other [contract not legible] . . . contracted by it or its agents in and by the sale of said Bat-Weights and all costs and expenses of advertising the same and selling and distributing the same, except as may otherwise be provided in this agreement.

7. During the period of this agreement, the PURCHASER shall not manufacture, sell, or distribute, either directly or indirectly, any device similar to the said Bat-Weights without the prior written consent of the SELLER. This agreement is intended to include the existing and any new models of Bat-Weights. In the event new models of Bat-Weights are developed and produced, this agreement shall apply in full force and effect to the same. The price of said new models shall be determined by agreement of the parties. In the event they are unable to reach agreement, the price shall be determined by arbitration pursuant to the rules then applying of the American Arbitration Association which shall select a price which shall provide for the SELLER [a] profit percentage equal to that of the Bat-Weights set forth in this agreement.

8. During the term of this Agreement and any extensions thereof, in the event the representations contained herein with respect to the exclusive right of the SELLER to

manufacture, sell and distribute the aforesaid Bat-Weights are not complete and correct or in the event said patent application is officially rejected in its entirety without further right of appeal or in the event the SELLER'S rights with respect to the said patent are infringed by any other person and the SELLER does not secure the immediate enforcement of said rights, the PURCHASER shall have the option to terminate this Agreement and return for full credit at the SELLER'S expense all Bat-Weights in its possession. The right of the PURCHASER to terminate this Agreement and to return for full credit at the SELLER'S expense all unsold Bat-Weights in its possession, shall also apply in the event said patent is declared substantially invalid after issue by any Court of competent jurisdiction without further right of appeal, if any, being exercised, or in the event the SELLER or the Owner of said patent fails to protect said patent after issue from infringement by any third persons. In the event the SELLER shall actively interfere with the PURCHASER'S exclusive rights to sell and distribute said Bat-Weights within its franchised area or in the event the SELLER shall to the extent of its authority to do so, fail to actively prevent the sale or distribution within the PURCHASER'S exclusive area of sale of Bat-Weights by any other person for any reason, the PURCHASER shall have the right to terminate this agreement and to return for full credit at the SELLER'S expense any unsold Bat-Weights in its possession. The obligation of the SELLER under this agreement to accept and repay for said unsold Bat-Weights shall be personally guaranteed by Frank G. Hamilton, Elston Howard and Vincent Salvucci and shall include costs of packaging, freight and handling.

9. In the event the SELLER shall fail to deliver the products within the time required by this agreement, the PURCHASER on 5 days written notice to the SELLER, shall have the right, without cancelling any other provision of this agreement, to arrange for the manufacture of such Bat-Weights as the SELLER shall fail to deliver by others or by the PURCHASER, in which event the SELLER shall be responsible for any damage suffered by the PURCHASER and in which event the PURCHASER shall pay to the SELLER the difference between the cost to it of the product pursuant to the provisions of this paragraph and the cost it would have paid to the SELLER pursuant to paragraph 3 of this agreement. The PURCHASER shall provide the SELLER a certified audit with respect to its costs of manufacturing this product and the number of units manufactured by the PURCHASER.

10. This agreement, including the prices for the Bat-Weights and the minimum purchase requirement of the PURCHASER, shall continue from year to year unless either party shall notify the other of the termination of the agreement in writing on or before the 31st day of October of the preceding year.

In the event the agreement is terminated by the SELLER pursuant to the provisions of this paragraph, the SELLER shall, at the option of the PURCHASER, repurchase from the PURCHASER all unsold Bat-Weights at the price paid therefor by the PURCHASER plus its costs of packaging and freight.

In the event the agreement is terminated by the PURCHASER pursuant to the provisions of this agreement at the option of either the SELLER or the PURCHASER

the SELLER shall repurchase from the PURCHASER all unsold Bat-Weights at the price paid therefor by the PURCHASER plus its costs of packaging. In no event shall the SELLER be required to re-purchase more than 25,000 units.

11. PURCHASER agrees to pay for all Bat-Weights previously ordered and received by the PURCHASER which have not as yet been paid for in the following manner:

(a) 10 days after the signing of this agreement: $3,021.68

(b) 20 days after the signing of this agreement: $10,371.70

12. If the PURCHASER shall become bankrupt or insolvent and/or if the business of the PURCHASER shall be placed in the hands of a Receiver, Assignee, or Trustee, whether by the voluntary act of the PURCHASER or otherwise, this agreement shall immediately terminate and without notice.

13. Upon any breach or default under this agreement by the PURCHASER, the SELLER may terminate this agreement by thirty (30) days' written notice given to the PURCHASER. Said notice and termination shall become effective at the end of said period, unless during said period the PURCHASER shall cure such breach or default. Upon such termination the SELLER shall have the option of repurchasing from the PURCHASER all the unsold Bat-Weights at the price paid therefor by the PURCHASER.

14. Upon the issuance of Letters Patent, either in the United States of America, or elsewhere, all packages for the article of manufacture covered by this agreement, both individual and bulk packages, shall be plainly marked with the Patent Numbers of the Letters Patents, as directed by the patent counsel for the SELLER. Any patent marking on the Bat-Weights themselves shall be done by the SELLER and any patent marking on the packaging thereof shall be done by the PURCHASER but only with respect to packages printed after notification of the issuance of the patent is received by the PURCHASER.

15. Any change in the individual packages for the Bat-Weights which differ from the packages currently being used by the PURCHASER shall first be approved in writing by the SELLER. In the event the PURCHASER desires to change the individual packages for the Bat-Weights currently in use it shall supply a sketch of such a change to the SELLER which change shall be deemed approved unless within ten (10) days of its submission to the SELLER the SELLER shall advise the PURCHASER in writing of its disapproval. The SELLER shall not unreasonably withhold its consent to any change. In the event the SELLER desires a change in the packaging it shall submit the same to the PURCHASER who shall not unreasonably disapprove of same—provided such change does not increase the cost of packaging to the PURCHASER.

16. The provisions of this agreement shall not be assigned without the written consent of the parties hereto, but shall otherwise be binding upon the heirs and successors of the parties hereto.

IN WITNESS WHEREOF, the parties have caused these presents to be executed the day and year first above written.

ATTEST:

/s/ Frank G. Hamilton
Frank G. Hamilton, Sec.

ATTEST:
/s/ James J. Miceli
James J. Miceli, Vice Pres.

As to Guarantee:
/s/ Elston Howard
Elston Howard

/s/ Frank G. Hamilton
Frank G. Hamilton

/s/ Vincent Salvucci
Vincent Salvucci

ON-DECK, INC.
/s/ Elston Howard
Elston Howard, President
GENERAL SPORTCRAFT CO., LTD.
/s/ Kenneth J. Edelson,
Kenneth J. Edelson, Vice Pr.
/s/ Elston Howard
Elston Howard